

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

MAURICE L. SEWELL
Claimant

VS.

WILLIAMS FIELD SERVICES COMPANY
Self-Insured Respondent

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Docket No. 251,120

ORDER

Respondent requested review of the July 27, 2004 Award by Administrative Law Judge (ALJ) Pamela J. Fuller. The Board heard oral argument in Wichita, Kansas, on December 21, 2004.

APPEARANCES

Randy S. Stalcup, of Wichita, Kansas, appeared for the claimant. Douglas C. Hobbs, of Wichita, Kansas, appeared for self-insured respondent.

RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award. In addition, the parties agree the claimant continues to receive a portion of his pre-retirement fringe benefits from respondent and that the ALJ erroneously included the entire value of the fringe benefit package within the claimant's average weekly wage. Thus, for purposes of post-injury average weekly wage and permanency computations, the Award must be corrected to reflect the correct average weekly base wage of \$946.20 plus \$9.83, which is the value of dental and life insurance benefits which have been discontinued. The balance of the fringe benefits have continued and should not, under K.S.A. 44-511(a)(2), be considered part of claimant's average weekly wage.

At the continuation of the regular hearing, respondent offered two videotapes into evidence to which claimant's counsel objected on the basis of "relevancy, materiality and lack of foundation".¹ Claimant does not dispute that he is the individual depicted in the tapes, and that he is the one shown playing golf in October 2000. The ALJ did not indicate whether these videotapes were included within the record. The Board finds that claimant's objections are overruled and the tapes are considered part of the record.

¹ R.H. Trans. (June 16, 2004) at 61.

ISSUES

The ALJ concluded claimant met with personal injury by accident arising out of and in the course of his employment with respondent on April 13, 1999.² As a result of that accident, she concluded claimant sustained a bilateral knee impairment that, when combined, constituted a 38 percent permanent partial impairment of the body as a whole based upon the opinions of Dr. Reiff Brown, the independent medical examiner selected by her pursuant to K.S.A. 44-510e(a). This 38 percent ignores any pre-existing impairment as the ALJ relied on claimant's uncontroverted testimony that his knees were asymptomatic before his April 13, 1999 accident. Thus, in spite of Dr. Brown's opinion that 50 percent of his rating was pre-existing and attributable to claimant's ongoing bilateral arthritic condition, the ALJ found claimant was entitled to recover the entirety of Dr. Brown's impairment assessment, which she found was 38 percent to the whole body.

The ALJ further concluded claimant was not entitled to general body permanent partial disability benefits (work disability) under K.S.A. 44-510e(a) because he voluntarily elected to retire from his position with respondent's company without first providing respondent an opportunity to accommodate his permanent restrictions. Thus, he was limited to his 38 percent functional impairment.

The respondent requests review of the ALJ's findings with respect to the nature and extent of claimant's disability. Respondent maintains claimant's impairment is limited to his right knee only and that any impairment to his left knee is solely attributable to his pre-existing arthritic condition. Moreover, respondent contends that claimant's decision to undergo a right knee replacement procedure, a procedure that was expressly denied by the ALJ following a preliminary hearing, only served to aggravate his condition and increase the resulting disability in his right knee as well as aggravate or accelerate his left knee condition. For this reason respondent requests that the Board find that the claimant suffered only a 6 percent impairment of the lower right extremity. Anything beyond the 6 percent to the right lower extremity is due to the claimant's severe bilateral degenerative arthritis and reflects a poor surgical outcome, neither of which is attributable to the April 13, 1999 injury. In addition, respondent asserts claimant's financial recovery is capped based upon the provisions of K.S.A. 44-510f(a)(4).

Respondent also asserts that any award should be reduced by the retirement benefits paid to claimant pursuant to his request to liquidate his retirement account on July 10, 1999. The source and precise amount of money received by claimant were the focus of a deposition given by Beverly Baber, a company representative. Whether this deposition comes into evidence and should be considered is in dispute. Claimant filed a Motion to Quash asserting that the respondent failed to provide reasonable notice of the deposition.

² At the regular hearing, respondent denied claimant's accidental injury "arose out of and in the course of his employment". On appeal, respondent no longer disputes this factual finding.

Claimant contends the ALJ appropriately awarded a 38 percent functional impairment to the body as a whole, but erroneously denied his claim for work disability benefits. Claimant argues he is entitled to work disability given his own testimony that he was physically unable to continue performing his work-related activities following his injury. According to claimant, he has incurred a significant task loss along with a 100 percent wage loss. Although claimant attempted to operate a mobile home repair business following his retirement, that business failed, and in February 2003, it was closed.

Claimant also contends the ALJ improperly considered the testimony of Ms. Baber as her deposition was the subject of a Motion to Quash. The ALJ failed to rule upon this motion although it appears from the Award that she considered Ms. Baber's testimony. Claimant believes Ms. Baber's testimony should be disregarded and as a result, there is insufficient basis upon which respondent can assert any credit or offset from the monies claimant accepted from his retirement or pension plan under K.S.A. 44-501(h).

The issues to be addressed are as follows:

1. The nature and extent of claimant's impairment, including work disability, if any;
2. Whether any of claimant's functional impairment was pre-existing for purposes of K.S.A. 44-501(c);
3. Whether the deposition of Beverly Baber is properly part of the record; and
4. Whether respondent is entitled to a retirement offset under K.S.A. 44-501(h).

FINDINGS OF FACT

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

1. Claimant was a longtime employee of the respondent employed as a senior gathering technician. This job involved checking field units and test meters, changing paper charts and mowing weeds over a certain geographical area.³ In order to test the meters claimant testified he would have to unroll a hose from his pickup and hook it up to a nitrogen bottle. After turning the nitrogen on, he would have to wait 20-30 minutes or an hour then reverse the process. He was also required to use heavy power tools to repair heads on engines.

2. In addition to his work for respondent, claimant owned a mobile home park and he operated a mobile home repair business. Claimant actually performed the repair work in this business, including applying roof coatings, repairing and replacing flooring and skirting on mobile homes.

³ R.H. Trans. (May 14, 2004) at 11-12.

3. On April 13, 1999, claimant was in the process of starting an engine in sequence with another employee, when he received a phone call. As he turned and started to run to answer it, his “right leg messed up.”⁴ Claimant stayed at his post, hobbling around and getting the engine going until a coworker came to relieve him. He then sought treatment from the hospital.

4. Claimant was referred to Dr. Michael J. Baughman, a board certified orthopaedic surgeon, for evaluation and treatment. At this point, claimant had a limited range of motion in his right leg, he had an antalgic gate and difficulty squatting. He required a crutch to ambulate. Dr. Baughman diagnosed a “right horn [sic] posterior medial meniscal tear and “fairly significant medial compartment knee arthritis.”⁵ Dr. Baughman suggested surgery and performed a right knee arthroscopy on May 3, 1999, during which the tear was repaired and a limited chondroplasty of the medial femoral condyle was done.

5. In May 1999, while still actively undergoing treatment for his right knee injury, claimant and his wife sold their mobile home park. Claimant testified that he sold the mobile home park because he and his wife were moving to Grove, Oklahoma.⁶

6. In July 1999⁷ claimant requested a lump sum distribution of his pension account. In addition, he also requested respondent pay out the balance of his 401(k) account. The specifics associated with these accounts, including the precise amounts paid and the source of the contributions are revealed in the deposition of Beverly Baber. Whether this information was properly offered and is considered part of the record is in dispute.

7. On August 17, 1999, claimant was released to full duty but told to work within the limits of his knee impairment.⁸ Dr. Baughman expected claimant to continue to be symptomatic from his knee arthritis and expected that he would need to adapt his activities to accommodate that condition.⁹ He testified that claimant bore a 7 percent permanent impairment to the right knee for arthritis (which he believed was pre-existing) and 7 percent permanent impairment for the torn meniscus.¹⁰

⁴ *Id.* at 12.

⁵ Baughman Depo., Ex. 2 at 16 (letter dated April 29, 1999).

⁶ R. H. Trans. (July 16, 2004) at 25.

⁷ The date of this request comes from the deposition of Beverly Baber. This date is not disclosed in the balance of the record.

⁸ *Id.* at 8.

⁹ *Id.* at 8.

¹⁰ *Id.* at 21.

8. Claimant returned to work at his normal job and continued in that position until September 17, 1999. He then retired. This date, September 17, 1999, reflects claimant's 30th anniversary with the company and is the date upon which claimant was first eligible to retire. Claimant testified that he was unable to perform his job. He stated his job consisted of "heavy lifting and a lot of walking",¹¹ and his right leg prevented him from doing his normal activities.

9. Claimant testified that he received approximately \$238,000 in retirement funds from his pension account, 100 percent of this being contributed by the respondent.¹² He also received some money from his 401(k), but he does not know how much he contributed and how much his employer contributed.¹³

10. In late 1999, claimant moved to Grove, Oklahoma. In 2000 he invested \$100,000 of his retirement funds into Sewell Mobile Home Repair. Unlike in his previous business, claimant did not perform any of the physical labor of the business. Rather, he employed his son to perform the physical work and claimant ran the business. He did not take a salary. Instead, he was living off his retirement monies. Claimant maintains this business never made a profit and in 2003, it was closed.

11. Claimant testified that approximately 6-7 months after his injury, he began to have pain complaints in his left knee. At his request, he was referred to another physician for a second opinion. He was referred to Dr. Guillermo Garcia in September 1999. Dr. Garcia recommended and provided a series of 3 injections to the right knee. Claimant's pain complaints continued until November 1999 and as of January 2000, Dr. Garcia recommended a knee replacement. Claimant was moving to Grove, Oklahoma, so the surgery was postponed.

12. In August 2000, claimant sought an evaluation from Dr. James Griffin, who concluded he was in need of a right knee replacement. Claimant also sought an opinion from Dr. Baughman about whether a knee replacement was advisable. According to Dr. Baughman, claimant's arthritis warranted the total knee replacement, but Dr. Baughman testified that the knee replacement would be considered treatment for the arthritis, not for the meniscus tear.¹⁴

13. In October 2000, claimant was the subject of surveillance. He was observed playing golf, getting in and out of a golf cart, twisting and swinging a golf club, repeatedly bending down to retrieve a ball and walking around the course. Claimant does not dispute

¹¹ R.H. Trans. (May 14, 2004) at 17.

¹² R.H. Trans. (July 16, 2004) at 12 and 43.

¹³ *Id.* at 43-44.

¹⁴ Baughman Depo. at 10.

that the tape depicts his activities on that date, only that he has played golf just once since his injury.

14. Claimant was evaluated by Dr. Sami Framjee on December 2000, during which no instability was found in the right knee, and he had a range of motion from full extension to 120 degrees of flexion. Dr. Framjee further found no active meniscal problem during the course of this exam. He examined claimant's left knee as well and like the right, found full extension to 130 degrees of flexion and no instability. Claimant complained of hurting and popping in the left knee as well as increased pain with activity in the right.

15. Dr. Framjee opined that, in accordance with the A.M.A. *Guides (Guides)*,¹⁵ claimant sustained a 30 percent permanent impairment to the right knee. "However, the apportion impairment of the right low extremity in reference to the right knee due to the meniscectomy and due to the work-related injury of 4-13-99 was rated as 5 percent."¹⁶ He went on to testify that claimant had no permanent impairment to his left knee as a result of his work-related injury. According to Dr. Framjee, any present complaints were attributable to claimant's arthritis and had nothing to do with his accident.¹⁷

Dr. Framjee further testified that as of this first evaluation, claimant had no permanent restrictions as a result of his accident and, therefore, had no task loss as a result of the meniscectomy.¹⁸ After viewing a videotape of the claimant playing golf, he further suggested that any knee replacement procedure be deferred until such time as claimant's symptoms were more debilitating.¹⁹

16. On February 14, 2001, a preliminary hearing was held before the ALJ. Claimant sought additional surgical treatment in the form of a knee replacement to his right knee. It appears from the transcript of that hearing that the videotape of claimant playing golf was shared with the physicians who had been treating claimant.²⁰ On February 23,

¹⁵ American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment*, (4th ed.). All references are to the 4th ed. of the *Guides* unless otherwise noted.

¹⁶ Framjee Depo. at 11.

¹⁷ *Id.* at 11

¹⁸ *Id.* at 14-15.

¹⁹ *Id.*, Ex. 2 at 11 (Dr. Framjee's Dec. 19, 2000 report at 4).

²⁰ Dr. Framjee reviewed the videotape in connection with his first evaluation of claimant. (See Framjee Depo. at 12).

2001, the ALJ denied claimant's preliminary hearing request for the knee replacement.²¹ Claimant appealed that Order, but the appeal was dismissed for lack of jurisdiction.²²

17. On February 4, 2002, claimant underwent a right total knee replacement. This procedure was paid for by claimant's private health carrier and was performed by Dr. James Griffin in Tulsa, Oklahoma.

18. On September 13, 2002, claimant was evaluated by Dr. Daniel Zimmerman at the request of claimant's attorney. According to Dr. Zimmerman, claimant reported a poor result from the knee replacement procedure. He complained of pain and discomfort to both his right and left knees. Claimant told Dr. Zimmerman that the left knee problems became very severe approximately one and one half years after the initial injury.

19. Dr. Zimmerman assessed a 75 percent permanent impairment to the right knee and a 7 percent to the left knee, for a combined whole body impairment of 32 percent.²³ He imposed the following restrictions: 20 pounds on an occasional basis and 10 pounds on a frequent basis. Claimant is to avoid flexing the right knee to a greater extent than the left and should, therefore, avoid frequent bending, stooping, squatting, crawling, kneeling and twisting activity at the knee level.²⁴

Dr. Zimmerman concluded, based upon a vocational task loss analysis provided by Jerry Hardin, that claimant had lost the ability to perform 7 out of 17 tasks he performed over the last 15 years of his working life. When asked, Dr. Zimmerman attributed claimant's altered gait and resulting left knee impairment to the initial injury to the right.²⁵

20. On April 29, 2003, claimant was again examined by Dr. Framjee. This examination took place after claimant's total right knee replacement. Dr. Framjee documented no point tenderness or effusion and full extension to 120 degrees of flexion with no instability in the knee. Like Dr. Baughman, Dr. Framjee testified that the need for the right knee replacement was for claimant's pre-existing arthritic condition and not for the torn meniscus.²⁶ He further testified that claimant's permanent impairment had increased in the right knee to 37 percent under both the 4th and 5th Editions of the *Guides*.²⁷ His

²¹ ALJ Order (February 23, 2001).

²² Board Order (May 22, 2001).

²³ Zimmerman Depo., Ex. 3 at 10-11 (p. 5-6 of Sept. 13, 2002 letter).

²⁴ *Id.*, Ex. 3 at 11 (p. 6 of Sept. 13, 2002 letter).

²⁵ *Id.* at 16.

²⁶ Framjee Depo. at 17.

²⁷ *Id.* at 17-18.

opinion relative to the left knee remained the same. He assessed no permanency due to the work-related accident for the left knee.

Dr. Framjee indicated claimant had suffered a task loss following his total knee replacement and based upon the vocational analysis provided by Steve L. Benjamin, claimant had lost the ability to perform 9 of 35 total tasks. This opinion assumes that claimant was not required to do certain crawling and kneeling activities continuously, for hours at a time.

21. The ALJ appointed Dr. Reiff Brown, an orthopaedic physician, to perform an independent medical examination. The examination took place on June 26, 2003. During the examination, claimant relayed an onset of complaints in his left knee which he attributed to the fact that he was now having to use his left knee more with weight bearing activities and so as to protect the right knee.²⁸ Dr. Brown observed a mild antalgic limp as well as mild instability in the right knee. The left knee was stable but with end range discomfort. Dr. Brown concluded claimant had a poor result of his total knee arthroplasty which, according to his history, “aggravated and rendered symptomatic” the arthritic condition pre-existing in his right knee to the extent that a total joint replacement was necessary.²⁹ Likewise, he concluded that, by history, there has been an aggravation of the pre-existing arthritic process in his left knee as a result of the altered gait. Put another way, Dr. Brown concluded claimant’s left knee symptoms appeared as a result of overuse due to his inability to ambulate properly on his right knee.³⁰

Dr. Brown provided a rather convoluted explanation as to how he assessed and assigned claimant’s permanent impairment. According to his deposition, he determined that claimant has a “30 percent impairment, permanent partial impairment of function of the body as a whole [sic] on the basis of his apparent poor results following total knee arthroplasty”,³¹ although 50 percent of that was due to pre-existing degenerative changes. With respect to the left knee, Dr. Brown assigned a 30 percent impairment to the left lower extremity attributable to the aggravation of the pre-existing degenerative changes that [sic] caused by overuse of the left leg to compensate for the right. Of this 30 percent, 10 percent was the result of the injury and loss of range of motion while 20 percent was attributable to narrowing of the medial joint line and the arthritic condition.³² When

²⁸ Brown Depo., Ex. 1 at 1.

²⁹ *Id.*, Ex. 1 at 2.

³⁰ *Id.* at 10-11.

³¹ *Id.* at 15.

³² *Id.* at 17.

converted and combined as required by the *Guides*, Dr. Brown testified that the resulting impairment was 19 percent to the body.³³

He imposed the following restrictions: avoid work that involves frequent squatting, frequent walking, frequent climbing ladders and stairs.³⁴ When asked to provide a task loss, he testified that claimant had lost the ability to perform 8 of the 35 tasks itemized by Mr. Benjamin.³⁵ When asked to use the task loss analysis prepared by Mr. Hardin, Dr. Brown found 5 tasks out of 17 were lost as a result of the work-related accident.

22. Drs. Brown and Baughman both testified that the *Guides* provide for no apportionment for impairment if an individual was asymptomatic prior to the accident that is being rated.³⁶ Claimant consistently denies any previous knee problems or symptoms and the record contains no indication that claimant ever sought out treatment or was ever assessed any permanency for the bilateral arthritic condition in his knees.

23. Claimant has made no effort to find employment since he closed his business in Oklahoma in 2003. Steven Benjamin has indicated that claimant “should be able to earn between \$566.40 and \$890.40 per week, or an average of \$741.67 performing work as a petroleum inspector, assistant construction superintendent or maintenance supervisor.”³⁷

24. On July 12, 2004, respondent served a notice to take the deposition of Beverly Baber upon claimant’s counsel. Respondent’s terminal date was set for July 14, 2004, and Ms. Baber’s deposition was scheduled for that same date. Respondent’s counsel knew, based upon prior letters, that claimant’s counsel was leaving town and would be unable to attend this deposition. Claimant’s counsel filed a motion to quash on July 12, 2004, upon receipt of the notice. Unfortunately, that motion was not heard nor addressed by the ALJ, either before the deposition nor in the Award. The deposition went forward, in the absence of claimant or his counsel. No motion to extend terminal dates was filed by either party.

25. The ALJ found claimant sustained a permanent functional whole body impairment of 38 percent. She concluded that claimant’s pre-existing arthritic condition was asymptomatic before his work-related injury. As a result, respondent was not entitled to any credit under K.S.A. 44-501(c). However, it is unclear how she concluded 38 percent to the body as a whole was the appropriate impairment based upon the testimony offered

³³ *Id.* at 17-18.

³⁴ *Id.*, Ex. 1 at 3.

³⁵ *Id.* at 35.

³⁶ *Id.* at 18-19; Baughman Depo. at 22-23.

³⁷ Benjamin Depo., Ex. 2 at 5.

by Dr. Brown. The ALJ possibly combined a 30 percent body as a whole with 30 percent lower extremity impairment (which converts to 12 percent whole body) which when combined, yields a 38 percent combined whole body impairment. At oral argument respondent's counsel suggested the ALJ simply doubled the 19 percent whole body rating which Dr. Brown assessed at his deposition, apparently concluding the 19 percent reflected only the "new" impairment. As she had found that claimant had no pre-existing impairment, she extrapolated a 38 percent functional impairment.

The ALJ further found that claimant voluntarily retired from his job with respondent without giving respondent any opportunity to accommodate him or his restrictions, if any. Thus, she denied his request for work disability under K.S.A. 44-510e(a), implicitly concluding he was capable of earning a comparable wage at his former position with respondent.

CONCLUSIONS OF LAW

The first issue the Board must address is the nature and extent of claimant's impairment. Respondent maintains claimant's impairment is limited to a right knee impairment, while claimant contends his physical limitations extend to his left knee as well, due to his altered gait and constitutes a permanent impairment to his body as a whole. In addition, respondent attributes much if not all of claimant's permanent impairment to his pre-existing arthritic process in both his knees as well as a poor result from his knee replacement surgery. Claimant asserts that his pre-existing arthritic condition, while advanced, was asymptomatic as of the time of his accident and necessitated the need for surgery. Accordingly, claimant argues respondent is responsible for the aggravation, acceleration and/or intensification of that condition, including the knee replacement surgery and all of the resulting impairment, poor result included.

It is well settled in this state that an accidental injury is compensable even where the accident only serves to aggravate or accelerate an existing disease or intensifies the affliction.³⁸ Here, the medical testimony establishes that claimant had an asymptomatic, pre-existing bilateral arthritic process in his knees as well as an acute tear of the meniscus. That same evidence establishes it is more probably true than not that while he injured his right knee initially, he nonetheless developed pain and an intensification and acceleration of the arthritic process in his left knee as a result of his underlying work-related accident. Under these facts and circumstances, the Board affirms the ALJ's conclusion that claimant has a permanent impairment to both his lower extremities as a result of his April 13, 1999 work-related injury.

³⁸ *Demars v. Rickel Manufacturing Corporation*, 223 Kan. 374, 573 P.2d 1036 (1978); *Chinn v. Gay & Taylor, Inc.*, 219 Kan. 196, 547 P.2d 751 (1976); *Harris v. Cessna Aircraft Co.*, 9 Kan. App. 2d 334, 678 P.2d 178 (1984).

The Workers Compensation Act provides that compensation awards should be reduced by the amount of pre-existing functional impairment when the injury is an aggravation of a pre-existing condition. The Act reads:

The employee shall not be entitled to recover for the aggravation of a preexisting condition, except to the extent that the work-related injury causes increased disability. Any award of compensation shall be reduced by the amount of functional impairment determined to be preexisting.³⁹

The Board interprets the above statute to require that a ratable functional impairment must pre-exist the work-related accident. The statute does not require the functional impairment actually be rated or that the individual be given formal medical restrictions, but it is critical that the pre-existing condition actually constituted an impairment in that it somehow limits the individual's abilities or activities. An unknown, asymptomatic condition that is neither disabling nor ratable under the *Guides* cannot serve as a basis to reduce an award under the above statute.

The Board further affirms the ALJ's conclusion that respondent has failed to establish claimant suffered from a ratable impairment before his work-related accident. Claimant consistently testified that he had no problems with his knees before his 1999 work-related accident. There is no evidence he sought treatment or was limited in any way in his daily activities. Accordingly, the ALJ's finding on the issue of pre-existing impairment is affirmed. Respondent is not entitled to any reduction of the claimant's impairment under K.S.A. 44-501(c).

The Board finds, however, that the ALJ's assessment that claimant sustained a 38 percent permanent functional impairment to the body as a whole should be modified. It appears that the ALJ simply doubled the final 19 percent whole body impairment assigned by Dr. Brown, which she apparently believed was a "net" figure, thus discounting Dr. Brown's conclusion that 50 percent of the impairment was pre-existing. To be sure, Dr. Brown's opinion on claimant's bodily impairment is, at best, confusing. However, after reviewing the record, the Board finds claimant's functional impairment for his bilateral knee injury should be 19 percent to the body as a whole based upon Dr. Brown's opinions. The ALJ's Award is hereby modified to reflect an award of 19 percent permanent partial impairment to the body as whole as a result of the work-related injury.

Because claimant sustained an injury that does not fall within the statutory schedule, the Board must also consider whether claimant is entitled to permanent partial general bodily disability, or as it is more commonly known, work disability. Permanent partial general disability is determined by the formula set forth in K.S.A. 1999 Supp. 44-510e, which provides, in part:

³⁹ K.S.A. 1997 Supp. 44-501(c).

The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury. In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment. . . An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury.

This statute must be read in light of *Foulk* and *Copeland*.⁴⁰ In *Foulk*, the Kansas Court of Appeals held that a worker could not avoid the presumption against work disability as contained in K.S.A. 1988 Supp. 44-510e (the predecessor to the above-quoted statute) by refusing to attempt to perform an accommodated job, which the employer had offered and which paid a comparable wage. In *Copeland*, the Kansas Court of Appeals held, for purposes of the wage loss prong of K.S.A. 44-510e, that a worker's post-injury wages should be based upon the ability to earn wages rather than actual wages being received when the worker fails to make a good faith effort to find appropriate employment after recovering from his or her injury. If a finding is made that a claimant has not made a good faith effort to find post-injury employment, then the factfinder must determine an appropriate post-injury wage based on all the evidence before it.

The Kansas Appellate Courts have interpreted K.S.A. 44-510e to require workers to make a good faith effort to continue their employment post injury. The Court has held a worker who is capable of performing accommodated work should advise the employer of his or her medical restrictions and should afford the employer a reasonable opportunity to adjust the job duties to accommodate those restrictions. Failure to do so is evidence of a lack of good faith.⁴¹ Additionally, permanent partial general disability benefits are limited to the functional impairment rating when the worker refuses to attempt or voluntarily terminates a job that the worker is capable of performing that pays at least 90 percent of the pre-accident wage.⁴²

⁴⁰ *Foulk v. Colonial Terrace*, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), *rev. denied* 257 Kan. 1091 (1995); *Copeland v. Johnson Group, Inc.*, 24 Kan. App. 2d 306, 944 P.2d 179 (1997).

⁴¹ See, e.g., *Oliver v. Boeing Co.*, 26 Kan. App. 2d 74, 977 P.2d 288, *rev. denied* 267 Kan. 889 (1999), and *Lowmaster v. Modine Manufacturing Co.*, 25 Kan. App.2d 215, 962 P.2d 1100, *rev. denied* 265 Kan. 885 (1998).

⁴² *Cooper v. Mid-America Dairymen*, 25 Kan. App. 2d 78, 957 P.2d 1120, *rev. denied* 265 Kan. 884 (1998).

The good faith of an employee's efforts to find or retain appropriate employment is determined on a case-by-case basis.⁴³ An employee is not required to seek post-injury accommodated employment with the employer in every case.⁴⁴ An employee may be entitled to a work disability after seeking other employment when the injury prevents him or her from continuing to perform his or her job duties for the employer.⁴⁵

In addition, the Act neither imposes an affirmative duty upon the employer to offer accommodated work, nor does it impose an affirmative duty upon the employee to request accommodated work. Whether claimant requested accommodated work from an employer is just one factor in determining whether the claimant made a good faith attempt to obtain appropriate work.

Here, claimant testified he was unable to perform his regular job duties, but no physician told him to stop working as of August 1999. To the contrary, when he was released to return to work on August 17, 1999, he was given no restrictions. He was taken back at his regular job and there is nothing within the record that indicates respondent was displeased with claimant's performance during this time. Claimant worked that job for a month and did not ask for any job alteration or modification. Although he would later go on to receive further treatment for his ongoing complaints, formal permanent restrictions did not come until after he was released following his knee replacement in 2002.

While claimant now says that he would not have retired but for his knee injury, that contention is somewhat suspect and is at odds with his actions. Claimant requested his pension in July 1999, before he returned to work. Thereafter, claimant voluntarily retired after 30 years of service with his employer. He elected to take retirement on the first date it was available to him. At no time did he request modifications with respect to his job or make any request of respondent during the month of work before he retired to reassign him to a job that would lessen his physical complaints. In fact, there is nothing within the record that indicates claimant informed respondent that the duties associated with his job caused him physical difficulty. It is only now, in the course of this litigation, several years after leaving respondent's employment, that claimant expresses an inability to perform the job with respondent. Respondent welcomed claimant back after surgery and there is no indication, apart from claimant's subjective contention, that he was unable to perform the regular job duties required of him.

Even before he had completed post-surgery physical therapy following his May 1999 arthroscopic surgery, claimant began liquidating his assets in anticipation of his relocation to Oklahoma. He closed his mobile home repair business. He sold his mobile home park. He ultimately postponed surgery so that he could move to Oklahoma.

⁴³ *Parsons v. Seaboard Farms, Inc.*, 27 Kan. App. 2d 843, 9 P.3d 591 (2000).

⁴⁴ *Helmstetter v. Midwest Grain Products, Inc.*, 29 Kan. App. 2d 278, 28 P.3d 398 (2001).

⁴⁵ *Oliver v. Boeing Co.*, 26 Kan. App. 2d 74, 977 P. 2d 288, rev. denied 267 Kan. 889 (1999).

Arguably, after claimant was released following his knee replacement surgery and was subject to permanent restrictions, he may have been in a position to claim a work disability as those restrictions might well have precluded him from performing the job he voluntarily left. However, claimant made no effort to inform respondent of the restrictions and seek out accommodation. Admittedly, a claimant is not required to seek out post-injury employment with respondent in every case.⁴⁶ However, under these facts and particularly given the fact that most of the claimant's task loss is attributable not to the tasks involved in his job for respondent, but in his own mobile home repair business here in Kansas, the Board finds that claimant has failed to establish the requisite good faith in seeking out employment with respondent following his knee replacement surgery and subsequent release. This finding is also influenced by the fact that from 2000 to February 2003 claimant was running his mobile home repair business in Oklahoma. This business was making no profit for claimant and over the course of the 3 years it was in operation, never made a profit. Claimant was operating a business that made him no money but kept his son employed and did nothing to seek out appropriate and comparable post-injury employment. These facts further justify the Board's conclusion that claimant has not met the good faith test imposed upon him by Kansas case law.

In summary, the Board finds claimant has failed to establish his good faith effort to retain his employment with respondent. Accordingly, the Board affirms the ALJ's conclusion that claimant is not entitled to a work disability as the job claimant was performing at the time of his retirement paid a comparable wage. Under K.S.A. 44-510e(a), claimant's recovery is limited to his functional impairment.

The issue related to claimant's motion to quash the deposition of Beverly Baber is moot given the finding that claimant is not entitled to work disability and limited to his functional impairment.

All other findings and conclusions contained within the ALJ's Award are hereby affirmed to the extent they are not modified herein.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Pamela J. Fuller dated July 27, 2004, is affirmed in part and modified in part as follows:

The claimant is entitled to 7 weeks of temporary total disability compensation at the rate of \$366 per week or \$2,562 followed by 78.85 weeks of permanent partial disability compensation at the rate of \$366 per week or \$28,859.10 for a 19% functional disability, making a total award of \$31,421.10.

⁴⁶ See footnote 44.

As of January 20, 2005 there would be due and owing to the claimant 7 weeks of temporary total disability compensation at the rate of \$366 per week in the sum of \$2,562 plus permanent partial disability compensation at the rate of \$366 per week in the sum of \$28,859.10 for a total due and owing of \$31,421.10, which is ordered paid in one lump sum less amounts previously paid.

IT IS SO ORDERED.

Dated this _____ day of February 2005.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

DISSENT

Claimant's uncontradicted testimony is that he can no longer perform the duties of his job with respondent. Those duties included pulling hoses, overhauling engines, which involved removing heads weighing over 200 pounds, and using hand and power tools, including air wrenches that weighed 60-70 pounds. These tasks are clearly outside his restrictions and there is no evidence that respondent was able and willing to accommodate claimant's restrictions. The majority is imputing a wage to claimant from a job that claimant cannot perform. We would not. Instead, the undersigned would impute a wage to claimant based upon his current capacity to earn wages.

BOARD MEMBER

BOARD MEMBER

c: Randy S. Stalcup, Attorney for Claimant
Douglas C. Hobbs, Attorney for Self-Insured Respondent
Pamela J. Fuller, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director